STATE OF MICHIGAN

COURT OF APPEALS

SHERYL D. DIGIAMBERARDINO, Plaintiff-Appellant,	UNPUBLISHED January 28, 2014
v	No. 307848; 308349 Oakland Circuit Court
MICHAEL D. DIGIAMBERARDINO, Defendant-Appellee.	LC No. 1999-626653-DM

Before: WILDER, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

In Docket No. 307848, plaintiff appeals by right the family court order resolving the issue of the payment of expenses for the couple's minor child. In Docket No. 308349,[1] plaintiff appeals by right the family court order granting defendant's motion for summary disposition of plaintiff's request for attorney fees. We affirm.

In 2000, the parties entered a consent judgment of divorce. Initially, the parties shared custody of their minor child, a special needs child with autistic spectrum disorder. The parties recognized that their child would require specialized services, and they would incur uninsured medical expenses. On May 25, 2005, the parties stipulated to an order addressing these expenses. The parties agreed to create a fund for the minor's educational, therapeutic, and medical needs. Each party was to contribute $1,000 to the fund, and "all current, approved expenses" were to be paid by plaintiff. However, an accounting was to be provided to defendant. On August 22, 2005, the parties agreed to modify this account to provide that each party was to deposit $400 per month into the account. Over time, both parties lost and regained employment. In fact, defendant filed a motion to modify child support to account for a period of unemployment.

Plaintiff began to pay for a variety of services for the minor child. For example, the child participated in horseback riding, music lessons, summer programs, exercise programs including a

[1] The appeals were consolidated "to advance the efficient administration of the appellate process." *Digiamberardino v Digiamberardino*, unpublished order of the Court of Appeals, issued February 12, 2012 (Docket Nos. 307848, 308349).

personal trainer, and spa services. She also consulted with physicians regarding the minor child's medical and mental health needs and implemented dietary changes to alleviate some of the child's medical issues. The child's mental health issues impacted his physical health, and aggression issues manifested at school. Consequently, plaintiff retained an education advocate, to attend meetings and plan for the child. The education advocate also addressed the minor child's aggression issues, and he frequently changed schools. Plaintiff also pursued a lawsuit and appeal against Community Mental Health (CMH) after being advised that the agency would no longer pay for services previously compensated. Finally, plaintiff retained a criminal attorney to address an incident between the minor child and defendant, and the juvenile court did not take jurisdiction over the minor. As a result of the services for the minor child and the advocates retained, the fund for the minor child's expenses was depleted. Consequently, plaintiff personally loaned money to the fund or obtained loans from her parents to pay for the minor child's expenses. There is no indication in the lower court record that plaintiff ever filed a motion to modify child support to account for the child's extraordinary expenses in light of his special needs. Further, plaintiff did not consult with defendant regarding the services before they were incurred.

The parties attempted to resolve the issues of funding for the child's needs and child support through a friend of the court support specialist and the friend of the court referee. Plaintiff objected to the referee's recommendation, and the trial court granted the request for a de novo hearing. Ultimately, the parties agreed to resolve the issues of outstanding child support for years 2007 through 2011. With regard to the remaining issues, the court resolved the issue of the payment of the therapeutic services in favor of plaintiff. The court held that the fees charged by the education advocate did not constitute uninsured medical expenses for purposes of the minor child's expense account. The trial court also granted defendant's motion for summary disposition of the request for attorney fees for the CMH appeal that were in excess of $200,000, and the criminal attorney fees for the juvenile matter. From these holdings, plaintiff appeals.

Plaintiff first alleges that the trial court erred by denying the expenses for the education advocate and the attorney fees for the CMH and criminal cases.[2] We disagree. Appellate review

[2] To preserve an issue for appellate review, it must be raised, addressed, and decided in the lower court. *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328, 330 n 1; 802 NW2d 353 (2010). In *Featherston v Steinhoff*, 226 Mich App 584, 592; 575 NW2d 6 (1997), this Court held that the defendant disputed the proper amount of support under the guidelines in the trial court, and therefore, the issue of any deviation from the guidelines was not properly preserved. In the present case, the parties dispute whether this issue was preserved for appellate review. Plaintiff contends that the issue was raised before the referee and the trial court. Defendant contends that plaintiff never filed a motion to deviate from the child support guidelines and agreed to the amount of child support, and therefore, this issue is unpreserved. We do not have the benefit of the pleadings filed before the referee, and a motion to deviate from the child support guidelines for extraordinary expenses is not contained in the lower court record. Further, retroactive modification of a support payment due pursuant to a support order is only permissible for the period during which a petition for modification is pending. MCL 552.603; *Malone v Malone*, 279 Mich App 280, 285-286; 761 NW2d 102 (2008). A party may not obtain relief from

of the trial court's determination regarding the Michigan Child Support Formula (MCSF) or the statutory deviation criteria is de novo. *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007). However, the trial court's factual findings underlying an award are reviewed for clear error. *Id*. Accordingly, this Court will not reverse unless left with a definite and firm conviction that a mistake was made. *Id*. The appellant bears the burden of demonstrating that a mistake was made. *Id*. A trial court's discretionary rulings permitted by the MCSF or by statute are reviewed for an abuse of discretion. *Id*. An abuse of discretion occurs when the decision is outside the range of reasonable and principled outcomes. *Id*.

MCL 552.605 governs deviation from child support and provides in relevant part:

> (2) Except as otherwise provided in this section, the court shall order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau as required in section 19 of the friend of the court act, MCL 552.519. The court may enter an order that deviates from the formula if the court determines from the facts of the case that application of the child support formula would be unjust or inappropriate and sets forth in writing or on the record all of the following:
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> (a) The child support amount determined by application of the child support formula.
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> (b) How the child support order deviates from the child support formula.
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> (c) The value of property or other support awarded instead of the payment of child support, if applicable.
>
> (d) The reasons why application of the child support formula would be unjust or inappropriate in this case.
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> (3) Subsection (2) does not prohibit the court from entering a child support order that is agreed to by the parties and that deviates from the child support formula, if the requirements of subsection (2) are met.

The Michigan Child Support Formula Manual provides that deviations from the formula may occur and deviation from the formula may be warranted when the child has special needs or extraordinary education expenses. MCSF § 1.04(A), (E).

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judgment, MCR 2.612, for noncompliance with the statute. *Malone*, 279 Mich App at 288-289. The trial court did not rule on the application of retroactivity. Nonetheless, we may overlook preservation requirements when the issue addresses a question of law for which all necessary facts have been presented. *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010). Accordingly, we will address the merits of the issue. We also note that defendant did not file an appeal regarding the trial court's ruling of the issue of payment for therapeutic services, and we do not address it.

Although plaintiff contends that there should be a deviation from the child support guidelines, she fails to recognize that the account created to cover the minor child's special needs did not arise from the guidelines, but rather, the parties stipulated to an order for the creation of the fund and later modified the funding of the account with the aid of the referee apparently acting as an arbitrator. Settlement agreements should not normally be set aside, and once a settlement is reached, a party may not disavow it. *Vittiglio v Vittiglio*, 297 Mich App 391, 399; 824 NW2d 591 (2012). Courts are bound by property settlements reached through negotiations and agreements by parties to a divorce action in the absence of an exception such as fraud or duress. *Id*. at 400.

On May 25, 2005, the parties stipulated to fund the minor child's "education/therapeutic/medical needs" by depositing $1,000 into this fund for "all current, approved expenses." On August 22, 2005, the parties modified this account to provide that $400 would be deposited by each party on a monthly basis.[3] Thus, there were orders in place to account for the minor child's extraordinary medical needs and issues. Consequently, the trial court examined the fees requested by plaintiff for services for the minor child, such as horseback riding and personal training, and concluded that those were intended to be covered by the expense fund created for the benefit of the minor child. The trial court further held that, irrespective of any prior payments to the education advocate from the fund, it was not an expense governed by the fund and did not award it.

On this record, plaintiff failed to meet her burden of establishing a mistake, and we cannot conclude that the trial court's factual findings are clearly erroneous. *Stallworth*, 275 Mich App at 284. In the present case, the parties did not rely on the child support guidelines to cover the child's special needs. Rather, these parties agreed to create a separate account and the amount of the account. The trial court appropriately resolved the issue of what constituted an approved expense pursuant to this fund and held that the educational advocacy fees did not constitute medical expenses for purposes of the account. For this same reason, the challenge to the CMH appeal and the criminal attorney fees also fails. The contention that the trial court did not recognize that it had discretion with regard to MCL 552.605 is without merit wherein the court upheld and interpreted the parties' agreement regarding the minor child's expenses. *Vittiglio*, 297 Mich App at 400.

Next, plaintiff asserts that the trial court erred by failing to award the education advocate, CMH appeal, and criminal attorney expenses as attorney fees pursuant to MCL 552.13 and MCR 3.206. We disagree. The trial court decided this issue by granting defendant's motion for summary disposition. A trial court's ruling regarding a motion for summary disposition presents a question of law subject to de novo review. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). Summary disposition premised on MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Johnson v Pastoriza*, 491 Mich 417, 434-435; 818 NW2d 279

[3] The order found in the lower court record contains the signature of plaintiff and the referee acting as an arbitrator. Although defendant's signature does not appear on this order, counsel for defendant repeatedly argued that this was their agreement.

(2012). All well-pleaded factual allegations contained in the complaint are regarded as true and interpreted in a light most favorable to the nonmoving party. *Id*. at 435. "A motion under MCR 2.116(C)(8) may be granted only when the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. (citation and internal quotation omitted).

Michigan follows the "American rule," holding that "attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005) (citations omitted). In domestic relations cases, attorney fees are authorized by both statute, MCL 552.13, and court rule, MCR 3.206(C).

> Attorney fees are not recoverable as of right in a divorce action but may be awarded to enable a party to carry on or defend the action. MCL 552.13; MCR 3.206(C)(1). A party seeking attorney fees must establish both financial need and the ability of the other party to pay. MCR 3.206(C)(2)(a); *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010). This Court reviews a trial court's decision to grant or deny attorney fees for an abuse of discretion; the court's findings of fact on which it bases its decision are reviewed for clear error. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). The trial court abuses its discretion when its decision results in an outcome that falls outside the range of reasonable and principled outcomes. *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008). "The party requesting the attorney fees has the burden of showing facts sufficient to justify the award." *Woodington*, 288 Mich App at 370. This would include proving both financial need and the ability of the other party to pay, *Smith*, 278 Mich App at 207, as well as the amount of the claimed fees and their reasonableness, *Reed*, 265 Mich App at 165-166. [*Ewald v Ewald*, 292 Mich App 706, 724-725; 810 NW2d 396 (2011).]

MCR 3.206(C) governs attorney fees and expenses in domestic relations cases and provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses *related to the action or a specific proceeding, including a post-judgment proceeding*.
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> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
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> (a) the party is unable to bear the expense of *the action*, and that the other party is able to pay, or
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> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply. [Emphasis added.]

MCL 552.13 governs alimony, conservation of property, and costs in divorce proceedings and provides in relevant part:

> (1) In every action brought, either for a divorce or for a separation, the court may require either party to pay alimony for the suitable maintenance of the adverse party, to pay such sums as shall be deemed proper and necessary to conserve any real or personal property owned by the parties or either of them, *and to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency*. It may award costs against either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver. [Emphasis added.]

"The proper interpretation and application of a court rule is a question of law, which [the appellate court] reviews de novo." *Haliw v City of Sterling Hts*, 471 Mich 700, 704; 693 NW2d 753 (2005). The interpretation and application of a court rule is governed by the principles of statutory construction, commencing with an examination of the plain language of the court rule. *Id*. at 704-705. "The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." *Id*. at 706.

The interpretation and application of a statute presents a question of law that the appellate court reviews de novo. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. *Id*. First, the court examines the most reliable evidence of the Legislature's intent, the language of the statute itself. *Id*. "When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined." *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 222; 821 NW2d 503 (2012). Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman*, 493 Mich at 311.

A review of the plain language of the court rule and the statute governing domestic relations and divorce cases indicates that the recovery of attorney fees and expenses is limited to those "related to the action," MCR 3.602(C)(1), or those necessary to enable the adverse party to carry on or defend "the action, during its pendency," MCL 552.13(1). Both the court rule and the statute refer to "the action," not any action. The term "the" is a definite article and clearly evinces an intent to focus on one specifying or particularizing effect instead of an indefinite force. See *Robinson v City of Detroit*, 462 Mich 439, 458-459, 461-462; 613 NW2d 307 (2000).

In *Featherston v Steinhoff*, 226 Mich App 584, 585-586; 575 NW2d 6 (1997), the plaintiff female and the defendant male never married, but cohabited for eight years, and the plaintiff gave birth to the couple's son. The defendant provided the majority of the financial support for the household while the plaintiff cared for the children, performed household duties, and either attended classes or worked various jobs. The parties did not share a bank account, and the plaintiff did not contribute financially toward the purchase of the defendant's properties. Shortly before the parties ended their relationship, the plaintiff and her children (the couple's son and the plaintiff's two daughters) moved into a duplex owned by the defendant, one of several properties owned by the defendant, and he continued to provide financial support for the plaintiff

and her children. *Id*. The plaintiff filed suit for breach of contract and common-law marriage, but dismissed the common-law marriage claim at the start of trial. The plaintiff alleged that the defendant promised her financial security and represented that the couple was a family unit. She testified that the defendant promised her a home ("roof over [their] heads") and to pay for their son's college education. The plaintiff asserted that the defendant promised to leave the home that he designed and constructed to her in his will. The plaintiff requested a cash settlement despite the fact that the couple never married. The defendant countered by denying the allegations, requesting joint legal and physical custody of their son and a determination regarding child support. He asserted that he promised to provide a "roof over [the plaintiff's] head" for as long as they remained a couple. He further maintained that he did not promise or imply that he would support the plaintiff financially for the rest of her life. *Id*. at 586-587.

Although the trial court found an express and implied contract to provide financial support and security, this Court reversed the breach of contract claim, holding that the plaintiff failed to meet her burden of proof regarding consideration. *Id*. at 588-592. This Court further held that the trial court erred by awarding attorney fees to the extent that it did so to pursue the breach of contract claim as opposed to the defense of the child custody petition, holding as follows:

> Defendant further argues that the trial court abused its discretion in awarding attorney fees. We agree. This Court reviews the trial court's decision to award attorney fees for an abuse of discretion. *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 167; 561 NW2d 445 (1997). Generally, a party may not recover attorney fees, as either costs or damages, "unless recovery is expressly authorized by statute, court rule, or a recognized exception." *Burnside v State Farm Fire & Casualty Co*, 208 Mich App 422, 427; 528 NW2d 749 (1995). Here, the court had authority to award plaintiff attorney fees incurred in her defense of defendant's petition for custody, but not those pertaining to the contract action. *Id*.; MCR 3.206(C)(2); MCR 3.201(A); MCL 722.21 *et seq*.; MSA 25.312(1) *et seq*. Under MCR 3.206(C)(2), plaintiff may recover reasonable fees necessary to defend the domestic relations action if she is unable to bear the expense of the action and defendant is able to pay. See *Thames v Thames*, 191 Mich App 299, 310; 477 NW2d 496 (1991). The trial court, however, did not explain whether its award included attorney fees incurred in the custody action, the contract action, or both. We therefore remand for a determination whether an award of attorney fees was necessary to enable plaintiff to defend the custody action, and, if so, a determination of the reasonable fees plaintiff incurred in defense of that action. [*Id*. at 592-593.]

In light of the above cited authority and the plain language of the court rule, the trial court properly granted defendant's motion for summary disposition. Plaintiff sought to have defendant share in the expense of the CMH appeal (with fees in excess of $200,000), share in the expense of the juvenile action brought addressing the minor child, and share in the expense of the education advocate. Those fees were not incurred in support of or to defend the domestic relations action, but addressed collateral matters.

Plaintiff contends that the *Featherston* decision is easily distinguishable because it does not involve services that directly benefitted the minor child. However, in *Featherston*, the plaintiff's breach of contract action, if successful, would have directly benefitted the minors because it would have awarded the plaintiff a home free of encumbrances, a car free of encumbrances, $150,000, and $10,000 in attorney fees. *Featherston*, 226 Mich App at 587. The proper inquiry according to the statute and court rule is the need and ability to pay with regard to "the action", not whether there is a benefit to pursuing any action for the sake of the minor. Thus, plaintiff's attempt to distinguish the case law is without merit.

Affirmed. Defendant, the prevailing party, may tax costs. MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto